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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DLK DEVELOPMENT, INC.,

Plaintiff, Cross-defendant and
Appellant,

v.

MARTHA L. FLING,

Defendant, Cross-complainant
and Respondent.

B267062

(Los Angeles County
Super. Ct. No. SC116232)

APPEAL from a judgment of the Superior Court of Los Angeles County.
H. Chester Horn, Judge. Affirmed.

Feldman & Associates, Inc., Mark A. Feldman and Craig C. Lang for
Plaintiff, Cross-defendant and Appellant.

Law Office of Paul S. White, Paul S. White for Defendant, Cross-
complainant and Respondent.

Martha Fling hired DLK Development, Inc. (DLK), to serve as general contractor on an extensive remodel of Fling's house in Malibu. In violation of the parties' contract, DLK hired subcontractors without providing subcontractor bids to Fling or her architect, and without giving Fling the opportunity to choose the subcontractors. Fling terminated DLK as contractor, and DLK sued Fling. Fling brought a cross-complaint.

We find that the trial court, which conducted a bench trial, correctly determined that DLK was terminated for cause, that DLK was not entitled to damages, and that Fling could recover damages from DLK. We also conclude that the trial court properly denied a new trial motion brought by DLK.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2012, DLK sued Fling for breach of contract and other causes of action. DLK alleged that Fling terminated DLK as contractor for convenience, not cause, and therefore was contractually required to pay DLK its reasonable profit and overhead on work not completed, as well as reasonable costs for work performed, in a total amount exceeding \$116,000.

Fling filed a cross-complaint in October 2012. In her operative, amended cross-complaint, Fling alleged that Daniel Kaufman, the owner of DLK, made numerous representations to her, including that he would be personally involved in the project and would provide a full-time superintendent, that DLK's fee would be 10 percent of the cost of construction, and that he would obtain two to three bids from possible subcontractors and set up "face-to-face" meetings between Fling and potential subcontractors. The cross-complaint alleged that DLK did not comply with

these representations and other obligations. Fling sought damages for fraud, breach of contract, and other causes of action.¹

Relevant evidence

A bench trial was held in February 2015. Evidence presented at trial included the following:

In 2010, Fling hired architect Ed Niles to remodel her home. Niles worked on the project with Lisa Niles, who is also an architect.²

Kaufman submitted a letter to Niles in May 2011, in which he proposed that DLK act as general contractor on the project. Among other things, Kaufman wrote that DLK would collect three bids for each major trade and would provide an on-site, full-time supervisor for the job. Kaufman followed up with another letter to Niles in July 2011, in which he stated that subcontractors would be made available for in-person meetings with Fling and Niles. Additionally, Kaufman told Fling that he would present bids from at least two to three subcontractors per trade and she could select which ones to hire. According to Fling, she hired DLK because she believed these representations were true.

Niles testified that getting multiple bids from subcontractors for each trade was important because subcontractors often do not review plans carefully or visit the work site prior to building, and so individual bids might not cover the proper scope of work. In addition, obtaining multiple bids facilitates the development of an accurate construction budget. Because of

¹ Fling also named Kaufman as a cross-defendant. The trial court found that Kaufman was not personally liable for Fling's damages, and Fling did not appeal this ruling.

² Because Ed Niles was the primary point of contact for the parties, we refer to him generally as Niles.

the importance of multiple subcontractor bids, Niles discussed the issue with Kaufman “extensively.”

In September 2011, Fling and DLK entered into an American Institute of Architects’ “Standard Form of Agreement Between Owner and Contractor” (AIA Agreement). The AIA Agreement provided, in part: “The Contractor shall obtain bids from Subcontractors . . . and shall deliver such bids to the Architect. The Owner shall then determine, with the advice of the Contractor and the Architect, which bids will be accepted.”

Niles testified that during a two-month “bidding phase,” DLK was to present potential subcontractors so that Niles and Fling could meet with them. The meetings, however, never occurred. Furthermore, Niles did not receive the subcontractor bids that DLK promised to provide.

Demolition on the project began after Fling moved out of the house at the end of September 2011. Although demolition was performed by a subcontractor, neither Niles nor Fling was given the opportunity to choose the subcontractor, and neither received demolition bids prior to the time demolition commenced.

DLK also unilaterally chose the framing subcontractor without providing bids to Niles or Fling. Kaufman testified that the framing subcontractor began work in October 2011 pursuant to an oral agreement with DLK, and an actual, written subcontract was not executed until later. Niles and Fling only discovered that DLK hired a framing subcontractor when Lisa Niles and Fling saw the subcontractor working at the site. Fling was very concerned because she did not know how much the subcontractor would charge for framing.

On October 27, 2011, Niles sent Kaufman an e-mail stating that Kaufman never provided a “break down for framing labor and materials,” in

violation of instructions that framing work was not to commence before such information was received. Later that day, Niles sent another e-mail to Kaufman instructing him to tell the framer to review all of the framing costs based on the proper set of plans, and to prepare a complete cost breakdown. The following day, Lisa Niles e-mailed Kaufman, instructing that framing stop until the framer's work and costs were clarified. Despite these instructions, the framing subcontractor continued work on the project.

Both Ed and Lisa Niles testified that the framer's unapproved, premature work caused problems. Ed Niles stated that the plans called for insertion of steel frames to support the house. The framing subcontractor, however, framed the house in such a way that insertion of the steel frames in the prescribed manner became impossible. Lisa Niles testified that the framer worked off an early, incomplete draft of the plans, although Kaufman had been provided updated plans. Additionally, the framer was supposed to begin work by shoring up the house to ensure it was stabilized, but instead he proceeded straight to finishing work.

Following a contentious meeting at the job site on November 2, 2011, Kaufman indicated he would provide bids. On November 4, Kaufman e-mailed that he would leave bids at the site, but failed to do so. Despite his representations, DLK never provided a breakdown of labor and materials for the framing work. Although Kaufman eventually provided estimates from other potential framing subcontractors, most of these estimates did not contain a breakdown of costs.

By the beginning of November, Fling felt that DLK could not continue on the project. She consulted with Niles, who unequivocally stated that DLK should be terminated for cause. Niles believed that DLK violated the AIA

Agreement, and he felt that termination was “the only way to prevent this project from getting out of control.”

Fling hired an attorney, who sent a letter on November 11, 2011, providing seven days’ notice that Fling was terminating the contract with DLK. On November 17, Niles provided a letter detailing DLK’s breaches of the AIA Agreement, and stating that DLK was properly terminated for cause.

Following DLK’s termination, Lisa Niles examined the work that had been done on the project. He noted a litany of problems, including work that was performed incorrectly, work that should have been done but was not, and work that was done in a shoddy and deceptive manner. Lisa Niles believed that the architectural plans were not being followed, which ultimately was DLK’s responsibility.

Furthermore, Fling discovered numerous discrepancies in DLK’s billing. Fling was charged excessive amounts by DLK for various construction costs; the excess was credited by DLK toward its own contractor’s fees. In addition, DLK charged Fling for work that had not yet been completed.

Statement of decision

Following the submission of posttrial briefs, the trial court ultimately issued a statement of decision. The court described its primary task as deciding whether Fling’s termination of DLK was “for cause” or “for convenience,” as defined in the AIA Agreement. If the termination was for convenience, DLK would be entitled to recovery, while if it was for cause, DLK would have no claim against Fling.

The trial court found that DLK secured bids, hired subcontractors, and commenced work without informing Niles or Fling. Among other problems resulting from this lack of communication, the framing subcontractor’s bid

did not include costs for shoring, which resulted in the issuance of a change order, effectively increasing the total contract price. In addition, a soffit was framed incorrectly and had to be redone completely. Based on DLK's failures to provide bids and coordinate with Fling and Niles in hiring subcontractors, the court found that DLK materially breached the AIA Agreement, which allowed Fling to terminate DLK for cause.

With respect to Fling's claims against DLK, the trial court rejected DLK's argument that Fling improperly disregarded a dispute resolution process outlined in the AIA Agreement. The court noted that DLK, which sued Fling first, itself did not comply with the resolution process.

Finally, the trial court found that DLK overcharged Fling for a number of costs. In total, it found that Fling was entitled to damages of \$39,959 for excessive charges.

New trial motion and final judgment

DLK filed a motion for new trial arguing, among other things, that it discovered evidence following trial that contradicted Niles's trial testimony. In support of its motion, DLK filed a declaration submitted by David Nikzad, a former vice president of a flooring company. Nikzad stated that he provided a proposal for flooring to DLK prior to September 2011, and shortly thereafter was contacted by Niles, who confirmed receiving the proposal. According to Nikzad, when he spoke with Niles, Niles said he was preparing a budget for Fling's project based on proposals received from DLK. Nikzad could not be contacted prior to trial because, unbeknownst to DLK, he had moved to Hawaii.

The trial court denied the motion for new trial, finding that, even considering Nikzad's declaration, there was substantial evidence DLK failed to provide required subcontractor bids and related subcontracts.

Subsequently, the trial court entered judgment, finding in favor of Fling on DLK's complaint, and in Fling's favor on her cross-complaint against DLK. Total judgment, including costs, was for \$42,795.10.

DLK timely appealed.

DISCUSSION

I. Appellate standards

Our review is dictated by the procedural history of the case. "In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]" (*Estate of Young* (2008) 160 Cal.App.4th 62, 75-76.)

The issues raised by DLK on appeal are primarily subject to the substantial evidence of standard of review. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no*

consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.” (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874.)

In its appellate briefs, DLK ignores these controlling standards. As the appellant, DLK is obliged to set forth all material evidence supporting the trial court’s decision, not just those facts favoring DLK. (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 34.) DLK fails in this obligation, skewing the factual record in its favor, and disregarding key facts supporting the judgment. In addition, DLK argues that review should be de novo, but then largely bases its contentions on an assertion that its own evidence is more compelling than respondent’s.

Given these failures, DLK’s challenges to the trial court’s factual determinations could be treated as waived. (See *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408; *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 714). Nevertheless, we elect to address DLK’s arguments as follows.

II. Termination for cause

The AIA Agreement’s termination for cause provision states: “The Owner may terminate the Contract if the Contractor [¶] .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials; [¶] .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors; [¶] .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of a public authority; or [¶] .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.” The trial court found that Fling properly terminated DLK for cause under the fourth paragraph of this provision.

DLK contends that the trial court erred by finding DLK committed a substantial breach of the AIA Agreement. DLK argues: “This finding was made despite conflicting testimony provided by Daniel Kaufman and Ed Niles. The trial court decided to take the word of Ed Niles over that of Mr. Kaufman.” This weighing of evidence that DLK complains about is exactly the sort of analysis the trial court is empowered to undertake. The testimony of a single witness can constitute substantial evidence (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 768), and we do not second-guess the trial court’s determinations of credibility (*In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1175).

The trial court’s finding of a substantial breach was clearly supported by the evidence. (See *Brown v. Grimes* (2011) 192 Cal. App. 4th 265, 277 [normally, whether there is a “material” breach is a question of fact].) Both Niles and Fling testified that it was very important to receive multiple subcontractor bids prior to choosing subcontractors, and this requirement was extensively discussed with Kaufman. The AIA Agreement expressly contained such a requirement, and allowed the owner, with the advice of the contractor and architect, to choose the subcontractors. Despite this contractual provision, the evidence showed that DLK itself chose the demolition and framing subcontractors without consulting with Fling and Niles and without providing the necessary bids. By the time DLK finally provided some bids—and only because of Fling and Niles’s prompting—the demolition was largely complete and much of the framing had been done. Moreover, Lisa Niles noted substantial problems with the work that was done by the subcontractors, and a change order was required for shoring, a task that should have been part of the original bid. Given all of this evidence, the trial court was justified in finding a substantial breach by DLK.

DLK also argues that Fling failed to follow procedures required by the AIA Agreement in terminating DLK. The AIA Agreement provides that, when a reason exists to terminate the contractor for cause, “the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may, without prejudice to any other remedy the Owner may have and after giving the Contractor seven days’ written notice, terminate the Contract”

DLK asserts that the November 11, 2011, letter from Fling’s attorney providing seven days’ notice was insufficient because it did not contain Niles’s certification, but instead stated “a copy of the Architect’s certification specifying the basis for termination will be provided to you early next week.” The AIA Agreement, however, does not require that the certification be provided to the contractor, only that the contractor be provided seven days’ notice. Nor is it material that Niles’s eventual letter detailing DLK’s breaches was dated November 17, after DLK was given notice. The AIA Agreement does not require that the certification provided to the owner by the architect be in writing. Niles was deeply involved in the project, and the evidence shows that, prior to the time notice was given, he unequivocally recommended to Fling that DLK be terminated for cause.

Furthermore, even if DLK had been contractually entitled to receive a letter from Niles at an earlier date, DLK fails to show how it was prejudiced by the alleged failure to follow formalities. (See *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 310 [appellant bears the burden of establishing prejudicial error].) DLK had already breached the AIA Agreement by hiring the demolition and framing subcontractors and allowing their work to proceed without providing bids and without consulting

with Niles or Fling. By the time Fling decided to terminate DLK, DLK could not have cured these breaches.

The trial court therefore correctly found that DLK was properly terminated for cause.

III. Claims procedure

DLK next argues that Fling could not recover on her claims because she failed to comply with the AIA Agreement's dispute resolution procedures. The trial court found that DLK could not complain of any failure by Fling to follow the procedures because DLK, which initiated the action, itself did not comply with the procedures, and Fling's claims against DLK were brought in a compulsory cross-complaint.

Section 4.3.2 of the "General Conditions" appended to the AIA Agreement provided that "Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party." Notice of termination was given to DLK on November 11, 2011. DLK did not submit a claim to Niles until March 12, 2012, even though DLK contended that Fling's act of terminating the agreement entitled DLK to "reasonable profit and overhead on the work not executed." Since, based on DLK's own interpretation, termination gave rise to its claim against Fling, DLK had 21 days following notice of termination to initiate a claim by giving notice to Niles and Fling. Its March 12, 2012, notice was therefore untimely.

Furthermore, the AIA Agreement provided that unresolved claims were to be decided by arbitration. DLK, though, filed its lawsuit against Fling in superior court (not in an arbitral forum) on August 14, 2012. Thus, the trial

court had ample justification to determine that DLK did not comply with the agreement's dispute resolution procedures.

The trial court also correctly found that Fling's claims against DLK were compulsory. Under Code of Civil Procedure section 426.30, a defendant who, concurrent with the filing of an answer, fails to file a cross-complaint on related causes of action loses the ability to assert those causes of action at any point in the future. (Code Civ. Proc., § 426.30, subd. (a).) Causes of action are considered related when they arise "out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." (Code Civ. Proc., § 426.10, subd. (c).) Both DLK's and Fling's causes of action arose out of the construction on the project and the termination of DLK. Fling thus properly filed a compulsory cross-complaint against DLK.³

IV. Motion for new trial

Finally, DLK argues that the trial court erred by denying its motion for new trial. We review the denial of a new trial motion for an abuse of discretion, unless it involves factual determinations, which are reviewed for substantial evidence. (*Sandoval v. Los Angeles County Dept. of Public Social Services* (2008) 169 Cal.App.4th 1167, 1176, fn. 6.) Potential grounds for reversal are particularly limited when the trial court judge who denied the motion is the judge who sat at the bench trial, as was the case here. "There is always some conjecture in determining whether newly discovered evidence was likely to produce a different result where the case was tried to a jury. No

³ In any event, in addition to not arbitrating its own claims, DLK did not seek to compel arbitration of Fling's claims. This omission constituted further waiver of any argument that Fling failed to comply with the AIA Agreement's dispute resolution procedures.

one can say with certainty what the jury might have thought about the evidence. But where, as here, the same trial court to which the case was tried determines the new evidence was unlikely to have made a difference, there is no conjecture. We simply have no basis for contradicting the trial court.” (*Wood v. Jamison* (2008) 167 Cal.App.4th 156, 161.)

The trial court here did not abuse its discretion in finding that newly discovered evidence—the declaration of David Nikzad—did not compel a new trial. At most, Nikzad’s declaration may have contradicted Niles’s testimony that he did not receive any subcontractor bids prior to the time construction commenced. It did not prove that Niles received all required bids and related documentation. In particular, Nikzad’s declaration did not address bids pertaining to demolition or framing, which was the basis of the trial court’s finding of a substantial breach by DLK. Moreover, the declaration did not contradict the evidence that Niles and Fling were never given the opportunity to participate in choosing the demolition and framing subcontractors. For these reasons, the trial court correctly concluded its ruling in favor of Fling was supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Fling shall recover her costs on appeal.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.